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No. 2441

United States
Circuit Court of Appeals
For the Ninth Circuit

Appellee's Brief

TENABO MINING AND SMELTING COMPANY, a Corporation,

Appellant,

vs.

CHARLES D. BATES,

Appellee.

Upon Appeal from the United States District Court for the District of Nevada.

CORWIN S. SHANK,
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STATEMENT OF CASE FOR APPELLEE.

The appellant for its statement of the case has copied in full the entire pleadings, and has made but a brief statement of some phases of the facts as disclosed by the evidence. The case is somewhat unusual, in that it involves directly the stock-selling operations of the defendant corporation, and the connection of its chief managing officers and agents with those transactions. Indirectly it involves the Gem Consolidated Mining Company and the Tenabo Consolidated Mines Company, its predecessors in interest. Hiram Tyree was in control of the Gem Consolidated Mining Company, and Peyton B. Locker and John Janney, partners in the mining business, were in control of the Tenabo Consolidated Mines Company. In 1908 Tyree and Locker were both in New York vainly endeavoring to sell the stock of their respective companies. H. C. Edwards met them, and after suggesting that the property was not so far developed as to make the stock saleable, advised that they consolidate the two companies. The advice was followed, and the appellant is the result of the consolidation.

The appellant was organized for the purpose (according to the articles) of carrying on a general mining business—the organizers and first trustees being H. P. Clark, president of the Merchants' Bank; Lester D. Freed, merchant; R. T. Badger, cashier of the Utah National Bank; C. S. Varian and H. C. Edwards, all of Salt Lake City. (Tr. p. 121.) Of these directors Clark, Freed, Badger and Varian had no actual interest in the company whatever (Tr. pp. 209, 240), they having merely subscribed for the necessary amount of stock to enable them to be directors. Mr. Edwards, the only member of the com-

pany who had any interest in the property at that time, was engaged as an attorney in foreclosing a mortgage on a portion of the property which was turned in to the new company. Badger and Varian were picked out as directors by Mr. Tyree (Tr. pp. 248, 208), and Clark, Freed and Edwards by Locker and Janney. (Tr. pp. 240, 217.)

The authorized capital stock of the company was $3,000,000, divided into 1,500,000 shares of the par value of $2.00 each. The first business of the incorporators, after the election of officers, was to vote themselves each 2500 shares of the capital stock of the company for compensation for services and the right to purchase 5000 shares at 15 cents per share. (Tr. p. 295.) The next business was to purchase the property of the Gem Company for 450,000 and of the Tenabo Consolidated Mines Company for 300,000 shares, and then, after electing themselves as directors and authorizing themselves to provide for the sale of the treasury stock, the meeting of the incorporators adjourned.

Thereupon the directors held a meeting (Tr. p. 297) and voted to Messrs. Clark, Edwards and Badger as president, vice-president, and secretary and treasurer at a salary of $50 per month; also a salary to Mr. Varian as attorney of $50 for advice, expressly excluding all retainers or services in any litigation. Mr. Freed was not present at this meeting, and so he appears to have been omitted from the salary list, but he appears to have been present at the meeting of November 27, 1909, the first meeting after the company was in funds, and he was then placed upon the pay roll for $50 along with the rest. (Tr. p. 99.)

After passing the necessary resolution for the purchase of the properties of the two mining companies, as

theretofore agreed upon, a resolution was passed (by directors who could at that time have known very little of the company's affairs) granting to P. D. Locker an option to purchase 600,000 shares of the treasury stock at 15 cents per share for the first 400,000 shares and 20 cents per share for the remaining 200,000 shares. (Tr. pp. 303, 304.) Janney and Tyree shared equally with Locker in this contract. (Tr. p. 126.) Thereupon Locker began selling this stock in New York City at a price of 75 cents per share, using in his sales an application addressed by the purchaser directly to the appellant, and giving out a receipt in the name of the appellant for the purchase price at 75 cents per share. (Tr. pp. 220 et seq.) Although Mr. Badger, the treasurer of the company, was notified of this method of doing business (that is, a receipt in the company's name being executed for 75 cents per share, of which the company received but 15 cents per share), no protests ever seem to have come from the company. It seems, however (Tr. pp. 127, 128), to have finally occurred to Locker and Janney that this was a dangerous way of doing business (to have used the mails under this scheme would have made them liable to criminal prosecution under the postal laws), so after realizing $337.50 for the company and $1350 for themselves upon this proposition, they obtained a new contract from the company under which Locker and Janney were appointed the agents of the company to sell the stock of the company at not less than 50 cents per share. No commissions were to be paid, but Messrs. Locker and Janney were to be reimbursed for "such reasonable sums for expenses actually incurred by said parties in selling the said stock as the board may determine to be equitable and just." (Tr. pp. 131, 132.)

No stock was sold under this new arrangement (Tr. p. 133), and in the meantime it developed that the mining property which the company had started out with was not free of debt, in that there was a mortgage which Mr. Edwards, one of the directors of appellant, was foreclosing as attorney, and also a mechanic's lien. In order to clear up the matter of the mortgage, and incidentally have some money to pay the salaries of the officers, a block of 165,000 shares was sold for $25,000. (Tr. pp. 314, 315.) Neither Mr. Badger, the secretary and treasurer, nor Mr. Varian, the regularly retained attorney for the company at that time (Tr. p. 211), nor Mr. Janney (Tr. p. 86) could tell to whom this stock was sold, and Mr. Badger could not even tell the number of shares sold (Tr. p. 248), which showed how closely these officers attended to the business of the company. Of the $25,000 received for this stock, $448.60 went to the Windsor Trust Company of New York for services as fiscal agents; $18,860 went to clear up the mortgage which was being foreclosed; $1025.45 went to Mr. Edwards, the attorney for the plaintiff in the foreclosure and also a director in the appellant, and $2350 was immediately paid out to the other four directors as salary. (Tr. p. 141.)

No attempt was made to raise money except through the McCornick deal and the Locker contracts. (Tr. p. 216.) As Locker could not sell any more stock in this country at the excessive price asked, new fields had to be sought. France was sufficiently far away from the properties of the company to offer a good field for further operation, so Mr. Locker began to seek for a contract to sell the treasury stock to the French people. In the meantime Mr. Locker and Mr. Tyree had ceased amicable

relations with each other, and on account of the quarrel between these men the real intent and purpose of the incorporation began to dawn upon the directors, and, accordingly, all of them asked to be excused from any further participation in the scheme. As stated by Mr. Badger, "I closed my association because I did not want to do lots of things they wanted us to do—Locker and Tyree; also Janney, who seemed to side in with Locker." (Tr. p. 248.) As stated by Mr. Varian, "At the meeting had with reference to the French contract, I made it very clear to Mr. Janney just what I thought about it. I said we would not transact any more business for the corporation with Locker or Janney. He, Janney, said, 'Why don't you get out, then?' We said we would as soon as they could find another board to succeed us. I said we would not appoint any one connected with Tyree or Locker." (Tr. p. 213.) Accordingly, as stated above, all the directors resigned, and five new directors were named, one director resigning at a time, and the four remaining electing a new director in his stead. The new board as then organized consisted of W. Mont. Ferry, president; John Pingree, vice-president; E. O. Howard, treasurer and assistant secretary; John Janney, secretary, and Benner X. Smith, general attorney. Each member of this board qualified by showing 100 shares of the capital stock of the company. (Tr. pp. 325 et seq.)

Mr. Ferry was a director in Walker Brothers Bank and in the Utah Savings & Trust Company and held 100 shares of the appellant, having acquired them from Mr. John Janney for "about" $1.00. (Tr. p. 183.) He was asked by Mr. Howard to become a director. (Tr. p. 191.) He has never seen the property of the company, but

thinks Mr. Janney has seen it. (Tr. p. 184.) He testified: "It was never known that Mr. Janney was interested in the Locker contract." (Tr. p. 186.)

Mr. Howard was cashier of Walker Brothers Bank. He held 100 shares in the appellant, having acquired these shares from Mr. Janney for $1.00 when he was elected upon the board. (Tr. pp. 161, 166.)

John Pingree, cashier of the First National Bank of Ogden, held 100 shares in the appellant, for which he paid nothing. He was asked to go on the board by Mr. Janney. He did not know that Mr. Janney represented Mr. Locker. (Tr. p. 197.)

Mr. Smith, attorney at law of Salt Lake City, owned 100 shares which he received from Mr. Janney, for which he "possibly" paid $1.00. He was requested by Mr. Janney and Mr. Howard to become a director.

Upon the organization of the company, the directors voted themselves a salary of $50 a month each (Tr. p. 353), and authorized the making of Locker's French contract.

There appears to have been two meetings of the directors upon March 5, 1910. At the first meeting the president and the secretary were authorized to enter into a contract with Mr. Locker merely authorizing Mr. Locker to sell 450,000 shares of the treasury stock of the company for the price of not less than 50 cents per share, Mr. Locker to receive as his commission all in excess of the 50 cents and to pay all of the expenses of the sale, Mr. Locker, however, to be advanced the first $15,000 out of the sales to pay the expenses of the sale. (Tr. pp. 334 et seq.) At the next meeting of the company, held thirty minutes later (Tr. pp. 338 et seq.), a special power of

attorney was given to Mr. Locker authorizing him to enter into an agreement with some French bank, under which the appellant was to comply with the French laws regarding the sale of its treasury stock and was to give these bankers an option upon 450,000 shares of its capital stock at 6.25 francs per share. The procedure under which this stock was to be issued was as follows:

The 450,000 shares were to be deposited with a trustee (which was later named as the Windsor Trust Company). This trustee was to issue trust certificates (Tr. p. 409) showing that the bearer was entitled to 10 shares of stock and these certificates were to be deposited in a Parisian bank (which was later named as the Banque Franco-Americane). This Parisian bank was to deliver these certificates upon the payment of the agreed price. In this contract it was to be expressly agreed that the appellant was to be liable for none of the expenses of the admission to France or the flotation of the issue of stock, which were estimated to amount to $45,000.

At the same meeting a contract was authorized to be entered into with the Windsor Trust Company of New York to act as the trustee as required in the contract above set forth. (Tr. p. 406.) In spite of the fact that under the agreement with Mr. Locker the company was not to incur any of the expense of placing the stock in the French market, at the same meeting with the authorization of this contract, the board authorized the president and secretary to execute an undertaking whereby the company agreed to pay the various taxes and fees "which will be exacted in France for the duration of the life of this corporation." (Tr. p. 349.) (See also Article V of French contract, p. 370.)

Mr. Locker appears to have been unable to find any bank in France who would enter into this contract with him, so without any further authorization from the company he entered into an entirely different contract with one Bernard Desouches upon August 1, 1910, and upon October 29, 1910, the directors of the appellant approved this contract. This contract provided for the placing of the 450,000 shares of the treasury stock of the company at a price of 7 francs per share, this placing to be done through an underwriting syndicate to be formed by Bernard Desouches. The first 150,000 francs, however, received upon the sale of stock was to be turned over entirely to the managing committee of the underwriting syndicate. (Tr. pp. 365 et seq.)

On November 16, 1910, the company further authorized a commission of 2 francs per share to be paid to certain sub-agents out of the proceeds of the sale of the stock after the first 150,000 francs were paid out to the underwriting syndicate. (Tr. p. 381.)

From a letter from Mr. Locker dated July 13, 1911 (Tr. p. 458), it appears that he has collected some 96,250 francs from various persons who took an interest in this underwriting contract, but whether they ever actually made any sales of stock to purchasers is not known. It appears that certificates for about 66,000 shares were delivered by the French trustee, and the company has received from the French trustee the sum of $6511.83, this coming in three remittances of $2900.00 on November 17, 1911, $2887.18 on March 27, 1912, and $724.65 on July 15, 1912. (Tr. p. 147.) Whether this has been derived from the sale of stock, whether from the subscriptions of the underwriters, or from any other source, does not

appear to be known by any of the officers of the company.

Mr. Ferry, the president of the company, stated regarding the first remittance of $2900.00:

> "Yes, I know where the $2900.00 came from that was deposited with the company. It came from either Mr. Locker or the Franco-Americane Banque to the company. I think they were cables. We took the money for it and said 'Thank you.' I presume the company issued stock for it. I don't know. The books of the company here would not show whether it had surrendered anything for that $2900.00 or not." (Tr. p. 186.)

Mr. Howard, the treasurer of the company, stated:

> "On or about November 17, the company received a sum of money and deposited it in the Walker Brothers Bank. It was between $2900.00 and $3000.00 * * * and was received, I think, from Mr. Locker. It was for the use of the company—disbursements. I do not know anything else about it. * * * *I assumed it was proceeds from the sale of stock. The company entered into a contract with Mr. Locker to sell some of its treasury stock, and I presume this is the proceeds of the sale of some of that stock. * * * * They told me that was what it was. Mr. Janney did, I think. He did not say how much stock. I do not recall the exact details of the transaction. I think Mr. Janney must have wired him for the money." (Tr. pp. 164, 165.)

John Pingree, another trustee, knew "nothing of the transactions of the company, * * * nothing of the

receipt of any money." (Tr. p. 198.)

The only officers who appear to know anything about this were Mr. Janney and Mr. Smith. Mr. Smith said that "30,000 shares were ordered released for $3,000.00." The company "had to have funds to do the assessment work upon this property for 1911, and the matter was taken up by the board, and Mr. Janney was directed to advise Mr. Locker of the situation. We were advised that there were funds to be raised if we released this amount of stock." Mr. Smith did "not know to whom those French bearer certificates were sold," or "whether Locker got anything out of it or not. We were satisfied in order to raise this amount to let those certificates go." (Tr. p. 205.)

Nowhere does it appear just how much stock was released when the company obtained the remittance of March 27, 1912, or July 15, 1912. All that does appear is that 66,000 (or in another place 63,000) shares of stock have been turned over by the French trustee and the company has received from France $6511.83.

The financial transactions of this company so far as they were carried on by any one who was subject to subpœna from this court are shown in the bank statements on pages 141 to 145 of the transcript. From this it appears that since the organization of the company it has received the following sums:

From the sale of stock under the original Locker option at 75 cents per share..	$ 1,687.50
From the sale of 165,000 shares of stock to an unknown purchaser	25,000.00
From the sale of 2000 shares of stock at 50 cents per share to W. H. McCornick..	1,000.00

From loan from W. H. Shearman upon mortgage upon the property..... 1,500.00
From the French trustee..... 6,511.83

$35,699.33

During the same time it has expended the following sums:

Commissions and expenses to Locker under the original option, checks 1, 2, 23.....$ 1,900.00
Amount paid to McCornick & Company to clear up mortgage which was on the property at the time it was turned over to the company 18,860.00
Amount paid on account of principal and interest on the Shearman mortgage... 962.50
Amount paid for miscellaneous expenses (mostly incurred as a part of the sale of stock) 1,114.25
Amount paid Windsor Trust Co. and Union Trust Co. for fees in the matter of the sale of stock (checks 5 and 15 upon Walker Brothers Bank and amount deducted from $25,000.00 remittance).. 1,230.50
Assessment work on property..... 4,713.13
Taxes 261.97
Salaries and fees to directors..... 5,325.45

$34,367.80

FINANCIAL CONDITION OF APPELLANT.

The affairs of the company are now and have been for considerable time in a most deplorable condition. No

books have been kept from which it can be ascertained what the true condition of the company is. (pp. 79, 76, 136.)

Mr. Janney says that the directors never voted to open books and that whenever they opened books in their office (Locker & Janney) for any of their corporations, they employed an expert bookkeeper. (p. 104.) He says, however, that he thinks he told his stenographer to make up a statement of everything whether they balanced or not just before she left the office (p. 104), but says "we have never made up a ledger account with any of these concerns." (p. 103.)

Mr. Janney acknowledges that he had the only records, but that he does not know the condition of the company and he thinks if he does not, no one else does. (p. 101.) He is very obscure in answering to various items that he was asked about. He assumed that if the statement of Mr. Varian was not correct that he would correct it. (p. 102.) He also says that he was in doubt as to what the company owes Mr. Locker, his partner, but states as a matter of opinion that it is something like $902.00, and that he could not think of anything else that it owed him. (p. 101.)

It is acknowledged by the treasurer that the indebtedness of the company is $8297.75 (pp. 92, 166), and that this indebtedness, except the Shearman mortgage for $1000.00 (p. 387) is subject to payment on demand. (p. 182.) It does not appear what makes up this indebtedness, but it seems that it is made up in part of $5300.00 directors' fees (p. 96), $500 attorney's fees (p. 95), $902.00 to Mr. Locker (p. 101), and $1000 on account of the Shearman note and mortgage (pp. 165, 387, 180).

Now this gives the only indebtedness that appears from the record. There seem to be other matters that are claims against the company. For instance, in 1909, Janney & Locker presented a bill for expenses aggregating $2082.85. This covered $1800 for office rent, office expenses and other items for the year ending December 31, 1909. (p. 98.) This bill was turned down by the old board, which at that time had become hostile to Locker & Janney. (p. 211.) But Janney wants to say that "I think there is a decided mistake in that," and that he felt "very much irritated" at the time. Locker & Janney have not given up their right to this claim and further claims along the same line, and who can tell but what this claim about which Mr. Janney feels there is some mistake may be presented to the new board, which is confessedly not antagonistic to Locker & Janney. Mr. Howard acknowledges the company maintains an office in charge of Mr. Janney. (p. 161.)

Again, there is a claim on the Gem mine, which conveyed its property to the Tenabo, in the nature of a lien called the "Seaman lien," "which the Tenabo Company may have to pay," Secretary Janney says, but of which he had no personal knowledge. (p. 92.)

Then again there is the claim of Mr. Adsit under the agreement (p. 223) entered into by the Gem Consolidated Mining Company through Hiram Tyree, president of the Tenabo Consolidated Mines Company, and through P. B. Locker, president, whereby Mr. Adsit was given the right to enter in and upon any and all property of the two companies and extract therefrom ores of sufficient value to fully discharge all indebtedness, which is shown by the agreement to be $5000.00. This agreement was recorded

in Lander County, Nevada, and was subsequently ratified by the board of directors for the Tenabo Consolidated Mines Company before they merged with the Gem Consolidated Mining Company and formed the Tenabo Mining & Smelting Company. (p. 94.) The record does not show whether the Gem Consolidated Mining Company also ratified this agreement before that time or not.

Mr. Janney stated that there was no other lien on the property and stayed with his statement until this was called to his attention by complainant's attorney. (p. 92.) Then he said "he had never heard of anything being done by this company which would tend to cast the burden of paying that debt on one company rather than the other." (p. 93.)

In view of all the facts it is a serious question whether there would be any escape for the Tenabo Mining & Smelting Company, the merging corporation, if Mr. Adsir seeks to enforce his claim against the property.

In order to prevent the further increase of the company's indebtedness it is necessary that there be nearly $450.00 paid into the treasury each month. The current *monthly* expenses are as follows:

Director's fee .....$250.00 (p. 333)
Assessment work on 12 locations.. 100.00 (p. 103)
Incidental expenses, nearly..... 100.00 per month
(pp. 142, 143, 425, 426.)

This last amount is computed by taking the year 1910, which is evidently a representative year, as it does not show the expenses of incorporation and organization, and omitting the moneys paid for directors' fees and assessment work and two items amounting to $1550.00, which are assumed in this computation to be extraordinary.

The property of the Tenabo Mining & Smelting Company consists of the Gem mine, patented before the time of the merger, and the "Two Widows Claim," patented since the incorporation (pp. 100 and 141), and the remaining 12 claims which are locations only. (p. 80.) The Tenabo "has no other property, no office furniture, no safe or other office equipment." (p. 80.)

The value of the mining property is variously estimated by the different witnesses, the highest estimate being by Mr. MacVichie, an expert, testifying for the defendant, who says that with an expenditure of $55,000 (which said initial investment is computed in his report to the directors as shown by the minute book (p. 334) at $100,000), he estimates a profit could be made of $131,-770.00. (p. 253.) On the other hand, Mr. Sizer, a mining engineer of long and valuable experience, states that he made as full an investigation as he could do of the workings, being hampered in his investigation by the refusal of Mr. Raleigh, the Tenabo's man, to allow him the use of the mining machinery. (pp. 158, 159.) He says he thinks the development of the mining district of the Tenabo is not sufficient to justify the establishment of a smelter or stamp mill (p. 157), and their own witness, Mr. MacVichie, says it is absolutely necessary to put in a stamp mill in order to make a success of the property.

The company has had no income whatever for more than two years last past (p. 15), except from the sale of treasury stock. (p. 166.)

There is no market for the treasury stock in America (pp. 246, 7 and 483), and the fact that a syndicate, specially formed for the purpose of floating the stock in France, makes a purchase of only 40,000 shares (p. 487),

from which the company received the gross amount of $5787 (p. 145), after having given away 21,429 shares (p. 89) for advertising purposes elsewhere more fully discussed in this brief, plainly indicates that there is no market for it in France and that such sales as are made are due to personal solicitation on the part of the syndicate and its members who were willing to make such misrepresentations as appeared in the company's prospectus. (p. 236.)

What the credit of the company was and is, is very forcibly shown by the fact that Mr. Janney, who was appointed on December 6, 1910, to negotiate a loan of $3000 and if necessary secure the payment of the same by a mortgage on the company's property (p. 385), on December 13, 1910, reported that he had been able to secure a loan for $1500 on this security, and we find the company agreeing to pay 10% interest and voting Mr. W. H. Shearman, the mortgagee, 1000 shares of treasury stock as a bonus, given in consideration of said loan. (p. 387.) We note also that Shearman was paid an attorney's fee of $26.00 a couple of months thereafter. (p. 144.)

It is submitted that it conclusively appears:

1st. That the company is indebted to the extent of $8297.75, and that the greater part of the indebtedness is now due.

2nd. That it has a contingent indebtedness of $5000 on the Adsit claim, of $3279 and court costs on the Seaman lien, and possible claims on the part of Locker & Janney for office rent and expenses.

3rd. That the indebtedness of the company is accumulating at the rate of $450 per month.

4th. That the company has no funds with which to pay its indebtedness due or to become due.

5th. That it has no income.

6th. That it has no credit worthy of the name.

7th. That its only possible way of raising money is by the sale of its treasury stock, for which there is no market or sale in America and no sale elsewhere which will enable the company to realize more than enough to pay its directors' fees and other current overhead expenses.

8th. That the value of the company's property is wholly speculative and that it is of no value unless there is first an expenditure of from $55,000 to $100,000 made on it.

Moreover, the fifth article of the French contract (Tr. 370) provides for the repayment to Locker of 150,000 francs, expended or to be expended in advertising the sale of appellant's stock in France. It is true that this obligation is not due until sufficient stock is sold to net the company that amount, but since the company is to receive but a fraction of the total amount paid for the stock, this article necessitates the sale of a large amount of the stock before the company receives any benefit whatsoever from the contract. In view of the fact that the company had at the time of the execution of the Locker or French contract, issued approximately two-thirds of its million and a half shares of stock, and of the limited speculative value of the prospect, it is inconceivable that Locker, even with the assistance of his numerous agents, would be able to sell more than enough stock to pay to him $30,000 for expenses. (Tr. 364.)

In the event, therefore, of no interference by a court,

and the continuation of his stock selling operations, the company would be in no better financial condition with an additional large block of its stock outstanding. Indeed, if it should permit the sale of stock cut up into numerous small certificates with dividend coupons attached, it would probably be liable to purchasers in an action for fraud. At all events, its assets would be in jeopardy and disaster would follow.

Locker in his numerous letters. (Tr. 646-472), claims that the appellant is indebted to him to the extent of 150,000 francs. Whether his contention is sound or not, in view of the complications resulting from this contract, that obligation should be considered to some extent as bearing upon the financial condition of the company. Its ability to pay debts is certainly impaired by such an obligation.

EQUITY OF THE CASE MADE BY APPELLEE.

In addition to the numerous facts pointed out in appellee's statement of the case, we invite the court's attention to the Locker letters (Tr. 427 et seq.), and particularly the following excerpts:

> "The plan that I have carried out has not necessitated by making any representations as to the exact amount that would go into the treasury. The parties interested in the contract receive a commission which fully protects me in the matter of receiving a commission myself, and I say to you frankly that my idea is to pay the expenses that have been incurred on behalf of Tenabo both by you and by myself, take for ourselves a reasonable profit, all of which we can itemize in a

full and complete statement, and continue to lend our support to the company, not only in our personal efforts, but in our liberality from a financial standpoint.'' (Tr. 465.)

Also:

''I have been called up twice today and asked when I was going to deliver the shares that have been underwritten and paid for. I make all kinds of 'stalls,' but have held them off just about the limit. One day they will come and demand their money or the shares, and I will be in a devil of a fix insomuch as I shall be unable to deliver either one or the other.'' (Tr. 466.)

Also:

''The representation to the purchaser that the shares are treasury stock is equally true whether I gave to the company shares of stock in an equal amount as a guarantee and protection to them or whether I do not give those shares and the company pays the expenses. And my suggestion that I give to the company 21,000 shares as a protection to them was only to convince the Board of Directors that I had confidence in the results to be derived from the expenditure made by me, rather than an exchange of nominative shares for bearer shares.'' (Tr. 470.)

The court will observe that the corporation has sold and authorized the sale of shares of stock at prices ranging from 15 cents to $1.40, although it appears that no development work, excepting only annual assessment work, has been done, either on the appellant's claims or surrounding claims, and although nothing appears in the

history of the company by way of discoveries on or around the claims that would justify any variations whatever in the prices asked for stock. The fluctuation has been due rather to the personal needs of the promoters, and to their willingness under varying conditions to take chances on their representations. Their success, of course, has been determined by the ignorance of their prospective purchasers. It was, no doubt, for that reason that they sought purchasers who had no means of gaining information respecting real conditions. We appreciate the fact that in the absence of collusion or fraud in the joint enterprise, the Locker letters would not have great weight. However, in this case the proof is controlling that the corporation is a mere tool of the promoters.

FORM OF DECREE.

Complaint is made that the decree appointing and directing the receiver is interlocutory and not final. It is true that the decree is short and follows the practice in eliminating all reference to pleadings, evidence and the opinion of the trial court. The court, however, has spoken clearly. It has taken possession of all of the assets of the corporation, through its receiver, and has directed the receiver to ascertain such facts as may be necessary to enable the court to make a just and equitable distribution. The court has at the same time directed that the real property be converted into money for distribution, pursuant to the statute. No final decree has or can be made determining the rights of all parties interested until the receiver reports pursuant to his directions. The court might have entered a similar decree upon a preliminary order to show cause, and if it had done so and if the

property had been converted, and the necessary other facts determined, the final decree might have been made at the close of the trial.

The court has taken every precaution to protect the interests of all parties concerned, and in view of the history of the appellant, it is in no sense in a position to complain of the promised protection to its stockholders and creditors. The suit was instituted by the appellee "in behalf of himself and other stockholders" similarly situated, and, although other stockholders have not in form joined in the proceeding, it is freely admitted that others have contributed toward the expenses of this litigation, in order to protect their interests.

AUTHORITIES.

Upon the whole case we submit the following authorities:

Hawes vs. Contra Costa Water Co., 14 Otto. 450; 104 U. S. 450, 26 L. Ed. 827.

In that case Mr. Justice Miller sets forth some conditions under which a shareholder can maintain a suit against a corporation. We think this case comes clearly within the rules laid down:

See also:

Clark & Marshall on Corporations, Vol. 2, Sec. 556.

1 Foster Fed. Prac., page 517.

Aiken et al. vs. Colo. River Irr. Co., 72 Fed. 591.

U. S. Ship Building Co. vs. Conklin, 126 Fed. 132-6.

Jones vs. Mutual Fidelity Co., 123 Fed. 506.

Carson vs. Alleghany Window Glass Co., 189 Fed. 791.

In the last cited case the court says:

"If it has become impossible for the corporation to answer any of the ends of its creation, and it has thus utterly failed in all its purposes, a court of equity would, under its general jurisdiction and powers and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs for the benefits of those really interested, namely: its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise."

On questions of insolvency see:

Cunningham vs. Norton, 125 U. S. 77, 31 L. Ed. 624, where the court says:

"When a person is unable to pay his debts, he is understood to be insolvent.

It is difficult to give a more accurate definition."

Atwatter vs. Am. Exchange Nat. Bank, 152 Ill. 605, 38 N. E. 1017.

It is respectfully submitted that the decree should be affirmed.

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